

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INA PERCIVAL,

Plaintiff,

v.

LAINA POON,

Defendant.

CASE NO. C20-1040-JCC

ORDER

This matter comes before the Court on Defendant Laina Poon's motion to dismiss (Dkt. No. 12). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motion for the reasons explained herein.

I. BACKGROUND

Plaintiff Ina Percival and Defendant Laina Poon were in a registered domestic partnership for over ten years before they divorced in December 2018.¹ (Dkt. No. 1 at 2.) According to Ms. Percival, the last few months of the partnership did not go well. Ms. Percival alleges that on October 15, 2018, Ms. Poon pushed her into a closet and forced her to stay there by threatening to harm her and their children. (*Id.* at 2, 4.) The next day, Ms. Poon allegedly audio recorded Ms.

¹ Ms. Poon submitted documents suggesting the divorce was actually finalized in December 2019, but the Court accepts Ms. Percival's allegations as true for purposes of this order.

1 Percival in her home and later publicly disseminated the recording. (*Id.* at 2–3.)

2 Nearly two years later, Ms. Percival filed this lawsuit, asserting a federal cause of action
3 under the Electronic Communications Privacy Act of 1986 (“ECPA”), 18 U.S.C. §§ 2510–23,
4 along with eight claims arising under Washington law. (Dkt. No. 1 at 3–6.) Ms. Poon moves to
5 dismiss, arguing that the Court lacks subject matter jurisdiction and that, even if it has
6 jurisdiction, Ms. Percival fails to state a claim upon which relief may be granted. (*See* Dkt. No.
7 12.)

8 **II. DISCUSSION**

9 “Article III generally requires a federal court to satisfy itself of its jurisdiction over the
10 subject matter before it considers the merits of a case.” *Ruhrgas AG v. Marathon Oil Co.*, 526
11 U.S. 574, 583 (1999). Therefore, the Court addresses Ms. Poon’s jurisdictional arguments first.
12 Ms. Poon first argues that the Court lacks subject matter jurisdiction because the *Rooker–*
13 *Feldman* doctrine bars Ms. Percival’s claims. (Dkt. No. 12 at 5–9.) Second, Ms. Poon argues that
14 the Court does not have federal question jurisdiction because her ECPA claim—her only federal
15 cause of action —is “not necessary” because Ms. Percival could have relied exclusively on state
16 law causes of action to address the same conduct. (*Id.* at 10.) Finally, Ms. Poon argues that Ms.
17 Percival’s ECPA claim should be dismissed and, if it is, the Court should decline to exercise
18 supplemental jurisdiction over her state law claims. (*Id.*)

19 **A. Legal Standard**

20 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) “raises a challenge to
21 the Court’s subject matter jurisdiction.” *Svenson v. Google Inc.*, 65 F. Supp. 3d 717, 721 (N.D.
22 Cal. 2014). Such a jurisdictional challenge may be “facial,” in which the challenger accepts the
23 facts alleged in the complaint as true but asserts that they do not show the Court has jurisdiction,
24 or “factual,” in which the challenger disputes the truth of the factual allegations purporting to
25 demonstrate federal jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir.
26 2004). When presented with a facial challenge, the Court applies the same legal standard as for a

1 Rule 12(b)(6) motion—the Court accepts Plaintiff’s allegations as true and draws all reasonable
2 inferences in her favor. *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). Ms. Poon’s
3 Rule 12(b)(1) motion is a facial challenge: she accepts the allegations in the complaint as true but
4 argues that the Court does not have jurisdiction as a matter of law.

5 To address Ms. Poon’s final argument—that the Court should dismiss Ms. Percival’s
6 ECPA claim and decline to exercise supplemental jurisdiction—the Court must apply Federal
7 Rule of Civil Procedure 12(b)(6). Under that Rule, “[t]o survive a motion to dismiss, a complaint
8 must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible
9 on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*,
10 550 U.S. 544, 570 (2007)). A claim is facially plausible “when the plaintiff pleads factual
11 content that allows the court to draw the reasonable inference that the defendant is liable for the
12 misconduct alleged.” *Id.* “A pleading that offers ‘labels and conclusions’ or ‘a formulaic
13 recitation of the elements of a cause of action will not do.’” *Id.* (quoting *Twombly*, 550 U.S. at
14 555).

15 **B. The *Rooker–Feldman* Doctrine Does Not Apply.**

16 The *Rooker–Feldman* doctrine provides that federal district courts lack subject matter
17 jurisdiction to exercise appellate review over state court judgments. *See Rooker v. Fid. Tr. Co.*,
18 263 U.S. 413 (1923); *D.C. Ct. App. v. Feldman*, 460 U.S. 462 (1983). In *Rooker*, the United
19 States Supreme Court held that “when a losing plaintiff in state court brings a suit in federal
20 district court asserting as legal wrongs the allegedly erroneous legal rulings of the state court and
21 seeks to vacate or set aside the judgment of that court, the federal suit is a forbidden de facto
22 appeal.” *Noel v. Hall*, 341 F.3d 1148, 1156 (9th Cir. 2003). The doctrine was expanded in
23 *Feldman*, where the Court held that when an issue is “‘inextricably intertwined’ with an issue
24 resolved by the local court in its judicial decision, [a] federal district court [may] not address that
25 issue, for the district court would be, in effect, hearing a forbidden appeal from the judicial
26 decision of the local court.” *Id.* at 1157. But the “inextricably intertwined” test applies “[o]nly

1 when there is already a forbidden de facto appeal in federal court.” *Id.* at 1158; *see also*
 2 *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1142 (9th Cir. 2004) (“The inextricably intertwined
 3 test thus allows courts to dismiss claims closely related to claims that are themselves barred
 4 under *Rooker–Feldman*.”). “[W]here the federal plaintiff does not complain of a legal injury
 5 caused by a state court judgment, but rather of a legal injury caused by an adverse party, *Rooker–*
 6 *Feldman* does not bar jurisdiction.” *Noel*, 341 F.3d at 1163.

7 Ms. Percival does not allege that she was injured by an erroneous state court decision; she
 8 alleges she was injured by Ms. Poon. (*See* Dkt. No. 1 at 2–6.) The fact that her claims may relate
 9 to issues that arose in the parties’ divorce proceedings does not trigger the *Rooker–Feldman*
 10 doctrine. *See Noel*, 341 F.3d at 1164. Ms. Poon argues that Ms. Percival’s suit is a de facto
 11 appeal because she seeks to collaterally attack the parenting plan the parties agreed to in state
 12 court. (*See* Dkt. Nos. 12 at 7–9, 14 at 3–4.) But even assuming Ms. Poon’s allegation is true, the
 13 fact that “a favorable decision in federal court [for Ms. Percival] would undermine the credibility
 14 of the state court decision” does not bring the suit within the *Rooker–Feldman* doctrine and bar
 15 jurisdiction. *Lahey v. Contra Costa Cnty. Dep’t of Child. and Fam. Servs.*, 2004 WL 2055716,
 16 slip op. at 9 (N.D. Cal. 2004); *see also Kougasian*, 359 F.3d at 1140–41. Therefore, the *Rooker–*
 17 *Feldman* doctrine does not apply.

18 C. Federal Question Jurisdiction

19 Federal district courts have original jurisdiction over “all civil actions arising under the
 20 Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. If the Court has
 21 jurisdiction over a claim arising under federal law, it may exercise supplemental jurisdiction over
 22 claims arising under state law “that are so related to” the federal claim “that they form part of the
 23 same case or controversy.” 28 U.S.C. § 1367(a). If the Court dismisses the federal claim, it
 24 may—and generally should—decline to exercise supplemental jurisdiction over the remaining
 25 state law claims. 28 U.S.C. § 1367(c)(3); *see also Carnegie–Mellon Univ. v. Cohill*, 484 U.S.
 26 343, 350 n.7 (1988). Therefore, the Court’s jurisdiction depends on Ms. Percival’s ECPA claim.

1 1. Whether Ms. Percival’s ECPA Claim is “Necessary” is Not Relevant to Whether the
2 Court has Federal Question Jurisdiction.

3 Citing *Rains v. Criterion Systems, Inc.*, 80 F.3d 339 (9th Cir. 1996), Ms. Poon argues that
4 the Court lacks federal question jurisdiction because Ms. Percival’s ECPA claim is “not
5 necessary” because she could have proceeded exclusively under state law. (Dkt. No. 12 at 10.)
6 Ms. Poon misunderstands *Rains*. At issue in *Rains* was whether the court had federal question
7 jurisdiction because a question of federal law was a necessary element of a state law cause of
8 action. *Id.* at 345–46. Because the plaintiff’s claims under state law did not depend on questions
9 of federal law, the Ninth Circuit refused to recharacterize them as federal claims. *Id.* Ms. Poon
10 does not cite any authority supporting the proposition she advances here: that a federal court
11 lacks federal question jurisdiction whenever a plaintiff could have proceeded exclusively under
12 state law but chose to assert a federal claim. Indeed, as the *Rains* court noted, “the party who
13 brings a suit is master to decide what law he will rely upon.” *Id.* at 344 (quoting *Pan Am.*
14 *Petroleum Corp. v. Super. Ct. of Del. in and for New Castle Cnty.*, 366 U.S. 656, 662 (1961)).
15 Ms. Percival chose to rely upon both federal and state law, and the Court cannot disregard her
16 decision to do so.

17 2. The Court lacks jurisdiction over several of Ms. Percival’s claims regardless of
18 whether it dismisses her ECPA claim.

19 Ms. Poon next argues that the Court should dismiss Ms. Percival’s ECPA claim and
20 decline to exercise supplemental jurisdiction over her state law claims. But the Court lacks
21 jurisdiction over several of Ms. Percival’s claims regardless of whether the ECPA claim
22 survives. Therefore, the Court will address these claims before turning to the ECPA claim.

23 If the Court has jurisdiction over a claim arising under federal law, it may exercise
24 supplemental jurisdiction over state law claims “that are so related to” the federal claim “that
25 they form part of the same case or controversy.” 28 U.S.C. § 1367(a). State law claims are
26 sufficiently related to the federal claim if they “derive from a common nucleus of operative fact”

1 and the party bringing the claims “would ordinarily be expected to try them all in one judicial
 2 proceeding.” *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). A “relationship
 3 between the parties . . . does not . . . provid[e] supplemental jurisdiction over all possible claims
 4 between the parties.” *Bereket v. Portfolio Recovery Assocs., LLC*, 2018 WL 6266606, slip op. at
 5 3 (W.D. Wash. 2018). If the facts material to the federal claim are immaterial to the state law
 6 claims, the Court does not have supplemental jurisdiction over the state law claims. *Lei v. City of*
 7 *Lynden*, 2014 WL 6611382, slip op. at 4 (W.D. Wash. 2014).

8 Ms. Percival’s ECPA claim is based on two events: Ms. Poon’s alleged recording of Ms.
 9 Percival and her dissemination of that recording. (*See* Dkt. No. 1 at 3.) But several of Ms.
 10 Percival’s state law claims are based on other events, such as Ms. Poon allegedly trapping her in
 11 a closet the day before the recording and “with[holding] issues related to sexual and gender
 12 identity from” Ms. Percival throughout their partnership. (*Id.* at 4–5.) These claims do not arise
 13 out of the same nucleus of operative fact as the ECPA claim and, therefore, the Court lacks
 14 jurisdiction over them even if the ECPA claim survives Ms. Poon’s motion to dismiss.
 15 Accordingly, the Court DISMISSES Ms. Percival’s civil assault, false imprisonment, intrusion
 16 upon seclusion, breach of fiduciary duty, and defamation claims pursuant to Federal Rule of
 17 Civil Procedure 12(b)(1).² Ms. Percival’s intentional infliction of emotional distress claim is
 18 based both on the recording and the closet incident. (*Id.* at 3–4.) The Court also DISMISSES this
 19 claim pursuant to Federal Rule of Civil Procedure 12(b)(1) to the extent it is based on the closet

20 ² Ms. Percival’s sparse allegations make it difficult to determine whether the defamation claim is
 21 based on the alleged dissemination of the recording. Ultimately, the Court concludes that it is not
 22 because it does not mention the recording. (Dkt. No. 1 at 5–6.) Ms. Percival’s allegations in
 23 support of her false light claim are also sparse, but reading the complaint in the light most
 24 favorable to Ms. Percival, the Court understands the false light claim to refer to the
 25 dissemination of the recording. Ms. Percival alleges that Ms. Poon “distributed [the] recording to
 26 third parties with the intent of . . . placing [Ms. Percival] in a false light,” and Ms. Percival’s
 allegations in support of her false light claim refer to Ms. Poon “publicly disclos[ing]
 information about Plaintiff electronically through various social media Platforms.” (*Id.* at 2, 5.)
 These allegations, taken together, suggest that the false light claim is based on the dissemination
 of the recording.

1 incident.

2 Although Ms. Percival's remaining state law claims arise from the same nucleus of
3 operative fact as her federal ECPA claim, the Court will likely decline to exercise supplemental
4 jurisdiction over them if the ECPA claim does not survive. Thus, the Court turns to the ECPA
5 claim.

6 **D. ECPA Claim**

7 To state an ECPA claim, Ms. Percival must allege that Ms. Poon "intentionally
8 intercept[ed]" the contents of "any wire, oral, or electronic communication," using an
9 "electronic, mechanical, or other device." 18 U.S.C. §§ 2511(1)(a), 2510(4). If Ms. Percival's
10 ECPA claim is based on an oral communication, she must also allege that, at the time the
11 communication was made, she "exhibit[ed] an expectation that [the] communication [would] not
12 [be] subject to interception under circumstances justifying such expectation." 18 U.S.C. §
13 2510(2). Finally, if Ms. Poon was a party to the conversation, Ms. Percival must allege that Ms.
14 Poon intercepted the communication "for the purpose of committing [a] criminal or tortious act."
15 18 U.S.C. § 2511(2)(d).

16 Ms. Percival alleges that Ms. Poon violated ECPA when she allegedly "without consent,
17 audio recorded Plaintiff in her family residence." (Dkt. No. 1 at 3.) She also alleges that Ms.
18 Poon "intercepted Plaintiff's communications . . . for tortious purposes."³ (*Id.*) Although Ms.
19 Percival's complaint is not a model of clarity, the Court understands these allegations to mean
20 that Ms. Poon recorded a conversation between Ms. Percival and Ms. Poon while Ms. Poon was
21 in Ms. Percival's home.⁴ Ms. Percival does not allege, for example, that Ms. Poon planted a

23 ³ This latter allegation states: "[P]laintiff seeks Defendant's action was unlawful and was
24 obtained for tortious purposes." (*Id.*) What this allegation means is not entirely clear, but
25 construing it in the light most favorable to Ms. Percival, the Court interprets it to mean that Ms.
26 Poon made the recording for tortious purposes.

⁴ Ms. Percival refers to an "oral communication[]" in support of her Washington Privacy Act
claim, but refers only to a "communication" in support of her ECPA claim, without specifying
whether it was a wire, oral, or electronic communication. (Dkt. No. 1 at 3.) The Court

1 recording device in her home or that she recorded her speaking with someone else. In the
2 absence of these allegations, the Court understands that Ms. Poon was a party to the
3 communication and recorded it herself. Because Ms. Poon was a party to the communication,
4 Ms. Percival must allege that Ms. Poon intercepted the communication “for the purpose of
5 committing [a] criminal or tortious act.” 18 U.S.C. § 2511(2)(d). “If, at the moment [s]he hits
6 ‘record,’ the [party to the communication] does not intend to use the recording for criminal
7 tortious purposes, there is no violation.” *Caro v. Weintraub*, 618 F.3d 94, 100 (2d Cir. 2010).

8 Ms. Percival alleges that Ms. Poon “obtained [the recording] for tortious purposes,” (Dkt.
9 No. 1 at 3), but this allegation is too conclusory to meet federal pleading standards. *Caro*, 618
10 F.3d at 98 (holding that allegation that defendant intercepted the communication “with tortious
11 intent” does not suffice). Ms. Percival makes several more specific allegations about Ms. Poon’s
12 intent, but these all relate to Ms. Poon’s intent in *sharing* the recording on social media, not Ms.
13 Poon’s intent in *creating* the recording. Further, most of the purposes Ms. Percival identifies are
14 not criminal or tortious. For example, Ms. Percival alleges that Ms. Poon shared the recordings
15 on social media “with the knowing intent of disparaging Plaintiff publicly and using Plaintiff’s
16 recorded statements in conjunction with a state court custody case involving her children.” (Dkt.
17 No. 1 at 3.) But Ms. Percival does not explain why sharing a recording that is disparaging is
18 tortious or criminal, nor does she cite any statute making it a crime for Ms. Poon to use the
19 recording in state court.

20 Next, because the relevant communication was an oral communication, Ms. Percival
21 must allege that, at the time of the recording, she had a subjective expectation that her
22 communication was not subject to interception and that expectation was objectively reasonable.
23 *See* 18 U.S.C. § 2510(2); *see also United States v. McIntyre*, 582 F.2d 1221, 1223 (9th Cir.
24 1978). However, Ms. Percival never alleges that she did not expect the conversation to be

25 _____
26 understands Ms. Percival’s ECPA claim to be based on the same oral communication as her
Washington Privacy Act claim.

1 recorded, nor does she allege facts showing that such an expectation was objectively reasonable.
2 While there is little doubt that “individuals have a reasonable expectation of privacy from covert
3 recording of conversations in their homes, cars, and offices, and on their phones,” Ms. Percival
4 has not alleged that Ms. Poon’s recording was covert. *Fazage v. Fed. Bureau of Investigation*,
5 965 F.3d 1015, 1038 (9th Cir. 2020). If Ms. Percival was aware that Ms. Poon was recording and
6 chose to speak with her anyway, her ECPA claim fails.

7 Accordingly, the Court DISMISSES the ECPA claim pursuant to Federal Rule of Civil
8 Procedure 12(b)(6). Because the Court is likely to decline to exercise jurisdiction over Ms.
9 Percival’s remaining state law claims if she fails to state an ECPA claim, the Court declines to
10 address whether Ms. Percival has adequately pleaded those state law claims at this time.

11 **III. CONCLUSION**

12 For the foregoing reasons, the Court GRANTS Ms. Poon’s motion to dismiss and
13 DISMISSES Ms. Percival’s complaint without prejudice. Ms. Percival may amend her complaint
14 to address the deficiencies identified above within fourteen days of the date of this order.

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16 DATED this 15th day of March 2021.

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20 John C. Coughenour
21 UNITED STATES DISTRICT JUDGE
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